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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

BEFORE THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

STATE OF WEST VIRGINIA EX REL., OLEN L. YORK, III,

Petitioner,

v. **No. 12-1410**

WEST VIRGINIA OFFICE OF DISCIPLINARY COUNSEL and WEST VIRGINIA LAWYER DISCIPLINARY BOARD

Respondents.

RESPONDENTS' SUPPLEMENTAL BRIEF TO PETITIONER'S PETITION FOR A *WRIT* OF PROHIBITION

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I. INTRODUCTION

Pursuant to Rule 16(j) of the Revised Rules of Appellate Procedure, Renée N. Frymyer, Lawyer Disciplinary Counsel for the Office of Disciplinary Counsel, submits this Supplemental Brief to Petitioner's Petition for a *Writ* of Prohibition on behalf of the West Virginia Office of Lawyer Disciplinary Counsel and the West Virginia Lawyer Disciplinary Board, Respondents herein.

II. STANDARD OF REVIEW

W.Va. Code Section 53-1-1 states, "The *writ* of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has no jurisdiction of the subject matter in the controversy, or, having such jurisdiction, exceeds its legitimate powers." Petitioner clearly fails to meet the requisite standard for such an extraordinary remedy as required by the statute, and as set forth by this Honorable Court in State ex rel. Scales v. Committee on Legal Ethics, 191 W.Va. 507, 446 S.E.2d 729 (1994) and State ex rel. Hoover v. Bergh, 199 W.Va. 12, 483 S.E.2d 12 (1996).

This Court is "restrictive in its use of prohibition as a remedy." State ex rel. West Virginia Fire & Cas. Co. v. Karl, 199 W. Va. 678, 683, 487 S.E.2d 336, 341 (1997). Thus, "[a] *writ* of prohibition . . . will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers." Syl. Pt. 1, State ex rel. Westbrook Health Servs., Inc. v. Hill, 209 W. Va. 668, 550 S.E.2d 646 (2001); Syl. Pt. 2, State ex rel. Peacher v. Sencindiver, 160 W. Va. 314, 233 S.E.2d 425 (1977).

As this Court has explained many times:

> In determining whether to grant a rule to show cause in prohibition when a court is not acting in excess of its jurisdiction, this Court will look to the adequacy of other available remedies such as appeal and to the over-all economy of effort and money among litigants, lawyers and courts; however, this court will use prohibition in this discretionary way to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance."

Syl. Pt. 1, Hinkle v. Black, 164 W. Va. 112, 262 S.E.2d 744 (1979); *accord* Syl. Pt. 2, State ex rel. Allstate Ins. Co. v. Gaughan, 203 W. Va. 358, 508 S.E.2d 75 (1998); Syl. Pt. 1, Karl, 199 W. Va. 678, 487 S.E.2d 336; State Farm Mut. Auto. Ins. Co. v. Stephens, 188 W. Va. 622, 626 n.4, 425 S.E.2d 577, 581 n.4 (1992).

III. ARGUMENT

For the reasons set forth below and in Respondents' Response to Petitioner's Petition for *Writ* of Prohibition, under Rule 1 of the West Virginia Rules of Lawyer Disciplinary Procedure, the Office of Disciplinary Counsel (hereinafter "ODC") clearly has proper jurisdiction to investigate and prosecute violations of the West Virginia Rules of Professional Conduct committed by an individual who engages in the practice of law in West Virginia. The actions of Respondents are wholly consistent with the Rules of Lawyer Disciplinary Procedure and the applicable case law and do not amount to error as a matter of law. Moreover, Respondents have not exceeded their legitimate powers in the underlying matter and, as such, a *writ* of prohibition should not be awarded herein.

Rule 2.4 of the Rules of Lawyer Disciplinary Procedure provides, "The [ODC] shall evaluate all information coming to its attention by complaint or from other sources alleging lawyer misconduct or incapacity. . . . If the information alleges facts that, if true, would constitute a violation of the Rules of Professional Conduct, the [ODC] shall docket a complaint and conduct an investigation." Thus, as in the underlying matter, when ODC receives information concerning the alleged conversion and misappropriation of client funds by an attorney practicing law in this State, Respondents are required to take action. Such is precisely the reason this Court promulgated the Rules of Lawyer Disciplinary Procedure which affords Respondents the jurisdiction in this matter.

The simple fact that Petitioner was not admitted to practice in West Virginia while providing legal services to West Virginia citizens and working out of a Huntington law office does not shield him from the jurisdiction of this Court. Petitioner has been charged with harming West Virginia clients, the class of those whom this Court and Respondents have a duty to protect. Petitioner's lack of a West Virginia law license is not determining. Rather, it is the damage he has done while engaged in the practice of law in this State, and the further damage he could inflict upon the residents of this State that subjects Respondent to discipline.

Moreover, the fact that Petitioner's practice involved federal patent and trademark proceedings likewise does not render him exempt from this Court's authority or entitle Petitioner to any special consideration. Respondents do not dispute that Petitioner had the right and authority to represent patent clients before the United States Patent and Trademark

Office (USPTO) in West Virginia, and shall possess that right so long as he possesses a valid license to practice before that federal tribunal. The federal court has made clear, however, that the USPTO does not have exclusive jurisdiction even when the misconduct arose solely from the handling of patent matters: "Indeed, the regulations promulgated pursuant to [35 U.S.C. § 2(b)(2)(D) and 35 U.S.C. § 32] make clear that, while the Director is entitled to regulate the conduct of patent practitioners before the PTO, the Director's authority is not intended to preempt states' authority to discipline attorneys." Kroll v. Finnerty, 242 F.3d 1359, 1364 (Fed. Cir. 2001).

The first paragraph of the USPTO's regulations governing the conduct of patent practitioners states, in part, "This part governs solely the practice of patent, trademark, and other law before the Patent and Trademark Office. Nothing in this part shall be construed to preempt the authority of each State to regulate the practice of law..." 37 C.F.R. § 10.1. Because Respondents are not seeking to suspend or expel Petitioner from practicing before the USPTO; pursuant to Kroll, Respondents' conduct does not fall within the field of preemption outlined by Sperry v. Florida, 373 U.S. 379, 83 S.Ct. 1322, 10 L.Ed.2d 428 (1963).

This Court has the exclusive authority to define, regulate and control the practice of law in West Virginia. *See* Lawyer Disciplinary Board v. Allen, 198 W.Va. 8, 479 S.E.2d 317 (1996); Syl. pt. 1, State ex rel. Askin v. Dostert, 170 W.Va. 562, 295 S.E.2d 271 (1982); State Bar v. Earley, 144 W.Va. 504, 109 S.E.2d 420 (1959); W.Va. Code § 51-1-4a. Should this Court ultimately render a decision which would restrict Petitioner's privilege to practice

law before West Virginia courts, such would not be incompatible with federal legislation or otherwise be in conflict of any federal law. Indeed, the United States Supreme Court has "repeatedly emphasized . . . that disqualification from membership from a state bar does not necessarily lead to disqualification from a federal bar." Frazier v. Heebe, 482 U.S. 641, 647 n.7, 107 S. Ct. 2607, 96 L.Ed.2d 557 (1987).

When Petitioner practiced law in West Virginia, he voluntarily submitted himself to the jurisdiction of this Court and to its Rules of Professional Conduct. As such, absent conflict with federal law, this Court most certainly has the jurisdiction to determine where or when Petitioner could practice law within its borders. This concept is not novel, as other States have concluded that their authority to discipline non-licensed attorneys includes the ability to fashion practice limitations through their injunctive and equitable powers that are equivalent to license suspension, disbarment, or other sanctions related to an attorney's license. *See, e.g,* Iowa Supreme Court Attorney Disciplinary Board v. Carpenter, 781 N.W.2d 263 (Iowa 2010) (Iowa Supreme Court ordered an attorney who maintained offices in Iowa and provided legal services to persons in Iowa on federal immigration matters but who was not admitted to the Iowa State Bar to cease and desist from all practice of law in Iowa indefinitely due to violations of the Iowa Rules of Professional Conduct); In re Tonwe, 929 A.2d 774 (Del. 2007) (Supreme Court of Delaware ordered a non-licensed attorney to cease and desist from all practice of law in Delaware, declared attorney permanently unfit for admission to the Delaware bar, and placed prohibition on attorney's ability to appear in Delaware *pro hac vice* as injunctive relief similar to disbarment); Attorney Grievance Com'n

of Maryland v. Kimmel, 955 A.2d 269 (Md. 2008) (Maryland Court of Appeals ordered attorneys not licensed to practice law in Maryland be indefinitely "suspended," which, for purposes of attorneys not licensed in Maryland, included exclusion from any privilege allowed non-admitted attorneys associated with the practice of law within the state); In re Discipline of Doz, 160 P.3d 881 (Nev. 2007) (Recognizing its limitations on discipline of non-licensed attorney, court concluded enjoining attorney from practice of law in Nevada or appearing in Nevada court was appropriate sanction); Attorney Grievance Com'n of Maryland v. Barneys, 805 A.2d 1040 (Md. 2002) (Maryland Court of Appeals permanently excluded a non-admitted attorney from practicing law in Maryland); Mahoning County Bar Ass'n v. Harpman, 62 Ohio Misc.2d 573 (Ohio 1993) (The Ohio Board of Commissioners authorized the relator to determine if appropriate injunctive relief was appropriate against a non-attorney who was admitted to the USPTO who was alleged to have engaged in the unauthorized practice of law); Kennedy v. Bar Ass'n. of Montgomery Cty., Inc., 316 Md. 646 (Md. 1989) (Maryland Court of Appeals shaped an injunction against a federally licensed attorney who was not admitted to practice in Maryland, but who was admitted in the District of Columbia, and by the federal district court in Maryland); Ky. Bar Ass'n v. Shane, 553 S.W.2d 467 (Ky. 1977) (Held that attorney licensed in another jurisdiction was subject to the discipline deemed appropriate by the Kentucky court, including public reprimand).

The Rules of Lawyer Disciplinary Procedure promulgated by this Court outline the responsibilities, duties and 'powers' of the ODC. These Rules are vested in sound public policy and further the stated goals of the self-regulated lawyer disciplinary system in this

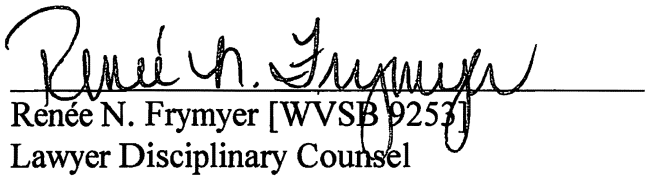
State. Not only do ODC's actions exhibit continued compliance with the Rules of Disciplinary Procedure and the applicable case law, ODC's adherence to the applicable Rules of Lawyer Disciplinary Procedure in this matter protects the public, protects the integrity of the disciplinary system, protects the administration of justice, and deters other attorneys from engaging in similar misconduct.

IV. CONCLUSION

For the reasons set forth herein and in Respondents' Response to Petitioner's Petition for *Writ* of Prohibition, Petitioner's Petition for *Writ* of Prohibition is without merit and clearly fails to meet the requisite standard for such an extraordinary remedy as required by West Virginia Code § 53-1-1 and as set forth by this Court in State ex rel. Scales v. Committee on Legal Ethics, 191 W.Va. 507, 446 S.E.2d 729 (1994) and State ex rel. Hoover v. Bergh, 199 W.Va. 12, 483 S.E.2d 12 (1996). Rule 1 of the Rules of Lawyer Procedure gives Respondents proper jurisdiction to prosecute alleged violations of the Rules of Professional Conduct against any lawyer who engages in the practice of law in West Virginia. ODC's decision to investigate and prosecute alleged violations of the Rules of Professional Conduct committed by Petitioner while he was engaged in the practice of law in West Virginia was proper and does not constitute a "clear legal error resulting from a substantial abuse of discretion." In addition, Respondents have not exceeded their legitimate powers in the underlying matter. Thus, Disciplinary Counsel respectfully requests that this Court not grant Petitioner the relief requested and instead dismiss and strike this matter from the Court's docket.

Respectfully submitted,

The Office of Disciplinary Counsel,



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CERTIFICATE OF SERVICE

This is to certify that I, **Renée N. Frymyer**, Lawyer Disciplinary Counsel for the Office of Disciplinary Counsel, have this day, the 25th day of February, 2013, served a true copy of the foregoing **RESPONDENTS' SUPPLEMENTAL BRIEF TO PETITIONER'S PETITION FOR A *WRIT* OF PROHIBITION** upon Lonnie C. Simmons, Esquire, and Robert B. Kuenzel, II, Esquire, Counsel for Petitioner, Olen L. York, III, by mailing the same, United States Mail with sufficient postage, to the following addresses:

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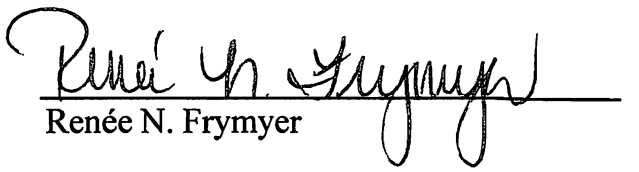

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